Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In The
Supreme Court of the United States
October Term, 1993

JO ANN SANDERS

Petitioner,

CITY OF KANSAS CITY, KANSAS, *et al.*,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner was denied due process of law when the Kansas Courts dismissed her cause of action based on her inability to obtain a copy of her 1989 federal tax return fromthe Internal Revenue Service within seven (7) days of the Court's Order?

II

PARTIES TO THE PROCEEDINGS

The parties to this proceeding include plaintiff and the City of Kansas City, Kansas as shown in the caption of the case. The parties also include Dorothy Devaney, City of Kansas City, Kansas Code Inspector and Officer Garrett, a Kansas City, Kansas police officer. All defendants are represented by the office of the City Attorney.

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No.

In The

Supreme Court of the United States

October Term, 1993

JO ANN SANDERS

Petitoner,

vs.

CITY OF KANSAS CITY, KANSAS, *et al.,*

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

Petitioner, Jo Ann Sanders, respectfully prays that a writ of certiorari issue to review the judgment of the Kansas Supreme Court which affirmed the dismissal of action under 42 U.S.C. § 1983 for petitioner's inability to obtain a copy of her 1989 tax return from the Internal Revenue Service within seven (7) days of the court's order that it be obtained and produced to opposing counsel.

OPINIONS BELOW

The decision of the Supreme court of the State of Kansas, rendered December 23, 1993, denying Petitioner's Petition for Rehearing, Appendix "A," and the decision of the Supreme Court of the State of Kansas, rendered November 9, 1993, denying Petitioner's Petition for Review, Appendix "B," affirmed the judgment of the Court of Appeals of the State of Kansas, rendered August 20, 1993, Appendix "C," upholding the judgment of the District Court of Wyandotte County, Kansas, dated which dismissed petitioner's 42 U.S.C. § 1983 claims against the City of Kansas City, Kansas purportedly for petitioner's failure to obtain a copy of her 1989 federal income tax return from the Internal Revenue Service within seven (7) days of the Court's Order and produce it to opposing counsel, Appendix "D."

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). The opinion of the Kansas Court of Appeals was rendered August 20, 1993. The Supreme Court of the State of Kansas denied review by summary determination on November 9, 1993. The Supreme Court of the State of Kansas denied rehearing on December 23, 1993.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Amendment VII:

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . .

Amendment XIV:

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

KANSAS CONSTITUTION

Kansas Constitution, § 18, Bill of Rights

> All persons for injuries suffered in person, reputation or property, shall have remedy by due course of law, and justice administered without delay.

STATUTES

42 United States Code, § 1983:

> Every person who, under color of any statute, ordinance, regulation, cusom or usage, of any State of Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioner is 76 years old and a resident of Kansas City, Kansas. On January 3, 1989, Kansas City, Kansas police officer Garrett and police officer Singleton responded to the residence of petitioner in response to her report of a burglary. After speaking with petitioner, the uniformed officers entered her home and seized two .22 caliber rifles, one 410 shotgun, and thiry .22 caliber shells which she kept for protection. Petitioner was lawfully in possession of the weapons and was not in violation of any local, state of federal law.

Petitioner placed various picket signs in front of her home protesting the conduct of law enforcement.

Thereafter, she moved from the residence and boarded up the windows and door to protect the vacant property from vandelism. On June 21, 1989, Dorothy Devaney, City of Kansas City, Kansas Code Inspector caused criminal charges to be filed against petitioner charging petitoner with violating a municipal ordinance by boarding up her house and allowing "no natural light or ventilation," and "by accumulating weeds, vegetation, junk and other materials thereby constituting a fire, health or safety hazard." Petitoner was subsequently imprisoned on the charges and denied the right to a trial by jury.

Petitioner filed a civil action in the District Court of Wyandotte County, Kansas pursuant to 42 U.S.C. §1983 in which she claimed that the respondents deprived her of liberty and property without due process of law. She claimed that defendants City of Kansas City, Kansas and officers Garrett and Singleton converted her guns without affording her a hearing of any kind. She also contended that The City of Kansas City, Kansas and Dorothy Devaney deprived her of liberty without due process of law by charging and convicting her of a crime without affording her a trial by jury and imprisoning her. Petitioner alleged that the municipal court charges and imprisonment were intended to deprive her of freedom of speech in retaliation for her placing signs on her property protesting the conduct of the City of Kansas City, Kansas, its officials, agents, and employees.

After filing her legal action, the District Court ordered petitioner to produce the first page of her 1989 federal income tax return to defendants *with all financial*

information deleted. Due to a recent burglary, petitioner was not in possession of her federal income tax returns. The court directed petitioner to go to the local IRS office and request a copy of the return so that it could be produced to defendants within seven (7) days of the court's order. Petitioner went to the local IRS office and ordered a copy of the return which was not provided to her until more than six (6) months later.

When petitoner was unable to produce the tax return which was not in her possession within seven (7) days as ordered by the court, defendants filed a motion to dismiss for failure to comply with the court's discovery order. On April 10, 1992 the court granted to defendant's motion to dismiss and dismissed petitioner's claims with prejudice.

Petitioner appealled the dismissal to the Kansas Court of Appeals which sustained the district court's dismissal by stating: "[We] are not convinced the district court abused its discretion when dismissing plaintiff's cause of action for her failure to comply with its discovery orders." Petitioner requested review by the Kansas Supreme Court which was denied. Petitioner then requested rehearing which was also denied.

REASONS FOR GRANTING THE WRIT

The courts of the State of Kansas and the Kansas Supreme Court have deprived petitioner of due process of law by conditioning her 42 U.S.C. § 1983 lawsuit on factors

beyond her control. Petitioner's continued cause of action was conditioned upon a federal governmental agency, the Internal Revenue Service, providing petitioner with a copy of her 1989 income tax return within seven (7) days of her request so that she could in turn provide it to opposing counsel. The income tax return was not within petitioner's possession, custody, or control. Petitioner's civil rights action was dismissed due to her inability to obtain the tax return from the Internal Revenue Service within the time set by the court.

WHETHER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT PERMITS THE STATE COURTS TO DISMISS A 42 U.S.C. § 1983 CLAIM BASED UPON THE FAILURE OF A FEDERAL GOVERNMENT AGENCY TO PRODUCE DOCUMENTS WITHIN THE TIME SPECIFIED?

Petitioner filed this civil rights action against the City of Kansas City, Kansas, two police officers and a municpal code enforcement employee for depriving petitioner of property and liberty without due process of law and for violation of petitioner's right to freedom of speech and expression. After the action was filed, defendants requested petitioner to produce a copy of the first page of her 1989 income tax return with all financial information deleted from the form. Petitioner was unable to produce the tax return because it had been stollen from her home during a recent burglary. At a hearing before the district court on March 20, 1992, petitioner informed the court that the document was not within her

possession, custody or control.

Nevertheless, the court ordered petitioner to obtain a copy of the tax return from the local Internal Revenue Service office and produce the same to defendant's counsel within seven (7) days, or on March 27, 1992. When petitioner was unable to comply with the court's order, the court dismissed the case on April 10, 1992 for failure to coply with the court's order. Approximately six (6) months later petitioner finally received a copy of the requested tax return from the Internal Revenue Service pursuant to her timely request. The Kansas Appeallate Courts refused to reinstate petitioner's cause of action and the Kansas Supreme Court denied review.

The authority of the court to require production of documents is set forth in the Kansas Rules of Civil Procedure, specifically, K.S.A. 60-234(a). That statute makes it clear that the court may order production of documents in a parties possession, custody or control, however, if the documents are not in the parties possession, custody or control a court may not order the production of same. In fact, petitioner did make diligent efforts to comply with the court's order; however, in petioner's ability to produce the document was entirely dependent upon the Internal Reenue Service over which petitioner had no control. Petitioner's claim was dismissed for her failure to perform an act which she could not reasonably have performed.

At the March 20, 1992 hearing, petitioner's counsel

offered to provide the opposing party with a signed authorization permitting them to obtain copies of the document from the Internal Revenue Service. Notwithstanding that offer, the court instructed petitioner to go the the local Internal Revenue Service office and request copies of the tax retun so that she could make it available to the respondent within seven (7) business days of the order. This could not be done and petitioner was ultimately penalized for being unable to expedite the administrative process of the Internal Revenue Service and obtain a copy of the tax return in a timely fashion.

Section 18 of the Bill of Rights of the Kansas Constitution provides that "all persons for injuries suffered in person reputation or property, shall have remedy by due course of law. . . ." Due course of law was not afforded to petitioner when her case was dismissed by the district court based on her failure to do something which she could not have done. Petitioner was therefore deprived of both liberty and property without due process of law.

In *Sigliano v. Mendoza,* 642 F.2d 309 (10th Cir 1981) the court held that due process requires that neither dismissal nor preclusion of evidence that is tantamount to dismissal may be imposed when failure to comply with discovery request is due to circumstances beyond the litigant's control. Although the court does have the power to order petitioner to produce copies of her income tax returns, *Rhodes v. Edwards,* 135 N.W.2d 453, 178 Neb. 757, *cert. den.* 86 S.Ct. 399, 382 U.S. 943, 15 L.Ed.2d 352 (1965), the court runs afoul of the due process clause when those records are not in a parties possession and cannot be produced within the time limit prescribed by the court.

In the present case the courts of the State of Kansas virtually deprived petitioner of her day in court by requiring her to do something which she could not do, that is produce a copy of the income tax return that was only in the possession of the United States Government. The court set an impossible condition on petitioner's access to the courts.

CONCLUSION

Petitioner respectfully requests that the court grant its Writ of Certiorari and set this matter for hearing. Petitioner further requests that the court declare and determine that petitioner's due process rights guaranteed by the 5th and 14th Amendments to the United States Constitution were violated by the courts of the State of Kansas and direct the Supreme Court of the State of Kansa to order that the matter be reinstated in District Court and permit petitioner to go foward with her evidence and trial.

Respectfully submitted,

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APPENDIX "A"

December 23, 1993

IN THE SUPREME COURT

OF THE STATE OF KANSAS

JO ANN SANDERS, APPELLANT V. CITY OF KANSAS CITY, KANSAS, ET AL., APPELLEES.

No 92-68502-AS

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING BY APPELLANT, JO ANN SANDERS.

DENIED.

CAROL G. GREEN
CLERK

APPENDIX "B"

November 9, 1993

IN THE SUPREME COURT

OF THE STATE OF KANSAS

JO ANN SANDERS, APPELLANT V. CITY OF KANSAS CITY, KANSAS, ET AL., APPELLEES.

No 92-68502-AS

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR REVIEW BY APPELLANT, JO ANN SANDERS.

DENIED.

CAROL G. GREEN
CLERK

APPENDIX "C"

ISSUED
AUGUST 20, 1990

COURT OF APPEALS OF KANSAS

No. 68,502

JO ANN SANDERS, *Appellant,* V. CITY OF KANSAS CITY, KANSAS, et al., *Appellees.*

SYLLABUS BY THE COURT

The filing of a motion with the appellate courts to docket an appeal out of time deprives the district court of jurisdiction to consider a pending motion to dismiss.

Appeal from Wyandotte District Court; PHILIP L. SIEVE, judge. Opinion filed August 29, 1993. Affirmed.

Paula A. Weaver, of Kansas City, Missouri, and *Bryan E. Nelson,* of Alder & Nelson, of Overland Park, for appellant.

Gail Christy, assistant city attorney, for appellees.

Before BRISCO, C.J., BRAZIL AND RULON, JJ.

RULON, J.: Jo Ann Sanders, plaintiff, appeals the district court's dismissal of her petition with prejudice for

failure to produce documents pursuant to a discovery order entered in her action against the City of Kansas Ci8ty, Kansas, *et al.*, defendants.

Two issues are before us: (1) whether this court has jurisdiction to hear this appeal, and (2) whether the district court erred in dismissing plaintiff's cause of action for failure to comply with a discovery order. We conclude this court has jurisdiction and affirm the judgment of the district court.

The essential facts are as follows:

In January 1991, plaintiff filed a petition in district court against the City of Kansas City, Kansas, a City code inspector, and two police officers, alleging violations of 42 U.S.C. § 1983 (1988) (sic), malicious prosecution, false arrest, false imprisonment, intentional infliction of emotional distress, conversion, defamation, libel, and slander.

As part of discovery in the case, defendants requested plaintiff to produce state and federal income tax returns. Plaintiff's counsel informed defendants' counsel that the tax returns would not be produced because such information was not relevant.

Eventually, defendants filed a motion to compel discovery, alleging plaintiff's failure to produce the returns. Defendants requested an order compelling production of the returns and other items. The district court held a discovery conference during which plaintiff agreed to produce portions of her 1989 state and federal

income tax returns. The court permitted plaintiff to delete income data, but required plaintiff to leave address and residncy information on the pages. All discovery was to be completed by April 3, 1992.

Defendants moved the district court for sanctions on March 4, 1992, for plaintiff's failure to comply with the discovery order. The motion sought dismissal of plaintiff's claims and attorney fees. The hearing on this motion was held March 20, 1992. Regarding production of the tax returns, plaintiff's counsel explained:

> "MR. NELSON: Judge, on the income tax, I had asked her for that, and we had stipulated at our hearing as to her residence which was the issue that was relevanat on that. I'd asked her for income taxes. She told me she had not been able to find a copy of it. I would certainly agree to do my best to get her to sign a release so that [the City] can obtain that from the IRS."

Defendants essentially responded that they should not have the burden of obtaining the return and "that any taxpayer can go the a legal IRS office and for a small fee can request a copy of it." Plaintiff's counsel then replied:

> "MR. NELSON: We'd certainly be willing to do it. I don't understand what the residency issue is. The United States constitution applies whether you're a Missouri resident or a Kansas resident."

Ultimately, the district court ordered plaintiff to produce the tax returns no later than March 27, 1992, or face dismissal of her claims with prejudice. This order was filed March 23, 1992. Defendants then filed a motion to dismiss the case on March 31, 1992, for plaintiff's failure to comply with court orders. A journal entry dismissing plaintiff's petition with prejudice was filed April 10, 1992. The journal entry provides that neither plaintiff nor plainitff's cousel appeared at the hearing.

Plaintiff eventually filed a motion to vacate the dismissal, alleging her counsel did not receive a copy of the motion to dismiss or notice of the hearing. At the hearing on the plaintiff's motion to vacate, her cousel stated he did not receive notice of the hearing until the court's administrative assistant called his office after the hearing had been concluded.

Plaintiff advised the district court that she had searched her home and car after the first order in January 1992 to produce her 1989 tax return, but had not found the document. Plaintiff further advised she had contacted the IRS for the return, but had not yet received same from the agency. The court eventually denied plaintiff's motion to vacate the dismissal.

On June 11, 1992, plaintiff filed her notice of appeal of the court's dismissal of her petition and denial of her motion to vacate. On July 14, 1992, defendants moved the district court to dismiss the appeal pursuant to Supreme Court Rule 5.051 (1992 Kan. Ct. R. Annot. 23) for plaintiff's failure to docet the appeal in compliance

with Supreme Court Rule 2.04 (1992 Kan. Ct. R. Annot. 7).

Plaintiff moved this court for permission to docket her appeal out of time on August 20, 1992. On August 21, the district court held a hearing on defendants' motion to dismiss the appeal. Finding plainitff had failed to docket her appeal within 21 days of filing her notice of appeal, the district court dismissed plaintiff's appeal.

This court granted plaintiff's motion to docket her appeal out of time on September 3, 1992, but we ordered the parties to show cause why the appeal should not be dismissed for lack of jurisdiction because the district court had dismissed the appeal prior to our grant of plaintiff's motion to docket the appeal out of time.

JURISDICTION

Defendants contend the district court's dismissal of plaintiff's appeal before this court acted on plaintiff's motion to docket her appeal out of time deprived this court of jurisdiction to entertain that motion and thus to hear this appeal. We disagree.

Plaintiff filed her notice of appeal on June 11, 1992. Pursuant to Rule 2.04, plaintiff was required to docket her appeal with the Clerk of the Appellate Courts within 21 days of filing the notice of appeal with the clerk of the district court. When plaintiff failed to do so, defendants filed with the district court a motion to dismiss the appeal due to plaintiff's failure to docket same.

Defendants' motion was made pursuant to Rule 5.051, which reads as follows:

"DISMISSAL OF APPEALS BY DISTRICT COURT

> "The district court shall have jurisdicition to dismiss an appeal where the appellant has filed the notice of appeal in the district court but has failed to docket the appeal with the clerk of the appellate courts. Failure to docket the appeal in compliance with Rule 2.04 shall be deemed to be an abandonment of the appeal and the district court shall enter an order dismissing the appeal. The order of dismissal shall be final unless the appeal is reinstated by the appellate court having jurisdiction of the appeal for good cause shown on application of the appellant made within thirty (3) days after the order of dismissal was entered by the district court. An application for reinstatement of an appeal shall be made in accordance with Rule 5.01 and shall be accompanied by a docket fee unless excesed under Rule 2.04."

Apparently no published Kansas appeellate court cases have squarely faced this issue and determined its effect on appellate jurisdicition. This court in *Knight v. Neodesha Police Dept.*, 5 Kan. App. 2d 472, 620 P.2d 837 (1980), did, however, consider a similar scenario.

"Several of the defendants have argued

> that this Court has no jurisdiction to hear this appeal because they filed a motion to dismiss the appeal in the district court prior to the docketing of this appeal. This Court allowed plaintiff to docket his appeal out of time, and once the appeal was docketed the district court lost jurisdiction to rule on the motion to dismiss. *Carson v. Eberth,* 3 Kan. App. 2d 183, 185, 592 P.2d 113 (1979)." 5 Kan. App. 2d at 476.

Like the instant case, in *Knight,* a motion to dismiss the appeal was filed with the district court before the appeal was docketed with the appellate court. Unlike the instant case, however, this court in *Knight* granted a motion to docket out of time *before* the district court acted on the motion to dismiss. Here, this court granted plaintiff's motion to docket out of time *after* the district court dismissed the appeal.

Initially, *Knight* does not appear to be authority for finding appellate jurisdiction of plaintiff's appeal. However, we believe inherent in our holding in *Knight* is the conclusion that a motion to dismiss which is pending before the district court does not deprive the appellate court of jurisdiction to entertain a motion to docket out of time. Here, plaintiff filed her motion to docket out of time on August 20, before the district court's dismissal of the case became effective when the journal entry was filed on August 26. We conclude that the filing of a motion to docket an appeal out of time with the appellate courts deprives the district court of jurisdiction to consider a

pending motion to dismiss.

In Kansas, the district court retains jurisdiction until an appeal is docketed with the appellate court. *Honeycutt v. City of Wichita,* 251 Kan. 451, 461, 836 P.2d 1128 (1992); *Carson v. Eberth,* 3 Kan. App. 2d 183, 185, 592 P.2d 113 (1979); Rule 5.051. Despite this circumstance, however, motions to docket out of time are filed with the appellate court and not the district court. Becuase, pursuant to *Knight,* an appellate court may permit an appellant to docket an appeal out of time despite a pending motion to dismiss in district court, the jurisdiction retained by the district court is already effectively limited. Furthermore, concluding this court has jurisdiction in this case would not seem to prejudice defendants in any appreciable way.

A liberal reading of jurisdictional statutes and rules is favored to allow litigants the opportunity to have their claims heard and determined. Recently, the *Honeycutt* court said:

> "Prior to the adoption of the 1964 Code of Civil Procedure, pleadings were technical and the failure to strictly follow rules generally was fatal. The new code attempted to bring a relaxed atmosphere to the legal practice. Notice pleading was adopted and substantial compliance, so long as the opposing side was not prejudiced, became the general rule. The theory was that, within reason, the litigants

> are to have their case decided in court on the merits and that judges should not be hypertechnical in interpreting statutes and rules to defeat the parties having their day in court. Jurisdictional statutes and rules, of course, must be followed; however, there are exceptions even in jurisdiciton matters." 251 Kan. at 459.

We conclude this court has jurisdiction to hear this appeal.

THE DISMISSAL

Defendants argue the record demonstates plaintiff repeatedly failed to make a good faith effort to obtain the tax return from the IRS despite numerous opportunities, and that plaintiff never informed the district court of any inability beyond her control to timely obtain the return.

A party to a lawsuit may request another party to produce documents which are within the scope of discovery and "which are in the possession, custody or control of the party upon whom the request is served." K.S.A. 1992 Supp. 60-234(a)(1). If the party fails to respond to such a request, the district court in which the action is pending may upon motion dismiss the action. K.S.A. 60-237(b)(2)(C); (d)(3).

> "The sanction of dismissal with prejudice is the most severe sanction a court can apply and its use must be tempered by the careful exercise of judicial discretion to assure that

its imposition is merited." *Beal v. Rent-A-Center of America, Inc.*, 13 Kan. App. 2d 375, Syl. ¶ 5, 771 P.2d 553, *rev. denied* 245 Kan. 782 (1989).

Sinply said, we have carefully reviewed the record and are not convinced the district court abused its discretion when dismissing plaintiff's cause of action for her failure to comply with its discovery orders.

Affirmed.

APPENDIX "D"

Filed:
April 10, 1992

DISTRICT COURT, WYANDOTTE COUNTY, KANSAS
CIVIL DIVISION

JO ANN SANDERS,

Plaintiff,

vs.

Case No. 91C25
Chapter 60
Division 8

CITY OF KANSAS CITY, KANSAS, et al.,

Defendants.

JOURNAL ENTRY OF DISMISSAL

Now on this 10th day of April, 1992 defendants' Motion to Dismiss comes on for hearing. Defendants appear by Gail Christy, Assistant City Attorney. Plaintiff appears not and is in default.

Whereupon defendants show the Court that plaintiff has faailed to comply with the Court's order entered of record March 23, 1992 and has failed to produce edited copies of the the (sic) first page of plaintiff's federal and state income tax returns for 1989. Pursuant to its previous order, the Court hereby dismisses plaintiff's claims against all defendants with prejudice.

IT IS THEREFORE ORDERED that plaintiff's claims against all defendants; the City of Kansas City,

Kansas, Officers Singletonnnnnn and Garrett and Dorothy DeVanney are hereby dismissed with prejudice

IT IS SO ORDERED

/S/ Philip L. Sieve
Hon. Philip L. Sieve
Judge of the District Court